89- 1392

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,
Petitioners,

– against –

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Do new regulations promulgated by DHHS under Title X of the Public Health Service Act which prohibit abortion counseling, referral and advocacy in programs funded under the Act and require physical separation of Title X-funded facilities and facilities engaging in abortion-related services, violate the woman's and the health professional's First Amendment rights?

2. Does the regulations' prohibition of abortion counseling and referral in a Title X-funded program violate the woman's constitutionally protected privacy right to make a fully informed decision on whether or not to continue her pregnancy?

3. Do the regulations' ban on funding of abortion counseling and referral and the requirement of physical separation violate congressional intent underlying Title X?

4. Are the new regulations arbitrary and capricious because they reverse longstanding agency policy in the absence of any intervening change in circumstances and because the change in policy admittedly was politically motivated?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit are those in the caption (appellants in C.A. No. 88-6204) as well as Dr. Irving Rust, Dr. Melvin Padawer, Medical and Health Research Association of New York City, Inc., Planned Parenthood of New York City, Inc., Planned Parenthood of Westchester/Rockland, and Health Services of Hudson County, New Jersey (appellants in C.A. No. 88-6206). The non-governmental appellants in C.A. No. 88-6206 petition separately for certiorari.

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Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on November 1, 1989.

OPINIONS BELOW

The decision of the district court is reported at 690 F. Supp. 1261 (S.D.N.Y. 1988). The decision of the court of appeals is reported at 889 F.2d 401 (2d Cir. 1989). The Second Circuit granted an injunction pending review on certiorari by this Court on November 21, 1989.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on November 1, 1989. On January 16, 1990, Justice Marshall signed an order extending the time to file a petition for certiorari to and including March 1, 1990. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech . . . .

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Title X of the Public Health Service Act, 42 U.S.C. § 300(a):

> The Secretary is authorized to make grants to and enter into contracts . . . to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services . . . .

Title X of the Public Health Service Act, 42 U.S.C. § 300a-6:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

Title X of the Public Health Service Act, 42 U.S.C. § 300a(a):

> The Secretary is authorized to make grants, from allotments made under subsection (b) of this section, to State health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services. No grant may be made to a State health authority under this section unless such authority has submitted, and had approved by the Secretary, a State plan for a coordinated and comprehensive program of family planning services.

Grants for Family Planning Services, 42 C.F.R. §§59.2, 59.5, 59.7, 59.8, 59.9, 59.10.

STATEMENT OF THE CASE

Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-41(1982), is the single largest source of federal support for family planning and reproductive health, funding over 3,900 clinics nationwide and serving nearly five million low-income women per year. The program was enacted in 1970 in "recogni[tion of] a basic human right, the right to freely determine the size of one's family, the timing of one's children". 116 Cong. Rec. 37381 (1970). The program was intended to subsidize "comprehensive voluntary family planning services", 42 U.S.C.A. §300 (West 1982) (Historical Note) [70-71a],[1] as well as information and education, *id.* at §300a-3, on "a broad range of acceptable and effective . . . methods" of spacing children. *Id.* at §300(a). Through Title X Congress intended to provide access to comprehensive family planning services for women who could not afford private medical care so that they could have the same range of reproductive choice as women of greater means.

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[1] Materials appearing in the Appendix to this petition will be referred to as ["__a"]. The Appendix is jointly filed by petitioners State of New York *et al.* herein, and by petitioners Rust *et al.*, which petition separately for review by this Court.

From this "broad range" of subsidized services, Congress excluded only one: abortions when provided as "a method of family planning." 42 U.S.C. §300a-6 (§1008 of the Act). Until the promulgation of the regulations challenged herein, the Department of Health and Human Services (DHHS) had always permitted and, since 1981 had required, recipients of Title X funds to provide information about and referrals for abortions to pregnant women. *See, e.g.*, HHS, *Program Guidelines for Project Grants for Family Planning Services* §8.6 (1981) [71a].

The Department had also interpreted §1008 to have no effect on activities funded by sources other than Title X, so that Title X grantees could continue to use private funds for whatever activities they wished, including the provision of abortions. *See, e.g.*, Memorandum from J. Mangel, Deputy Assistant General Counsel, to L. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (April 20, 1971) [74a]. Thus the agency never required separate personnel for, or physical separation of, facilities receiving Title X funds and those providing abortions. *See* General Accounting Office, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification* 14 (1982) [753A, Vol. 2].[2]

In February of 1988, the Secretary of DHHS promulgated regulations signaling a turnaround in agency policy regarding abortion. *See* 53 Fed. Reg. 2922-46 (1988) codified at 42 C.F.R. §§59.2, 59.5, 59.7 59.8, 59.9, 59.10. Section 59.8(a)(1) prohibits all counseling about and referral for abortion [3a]. If a woman asks about abortion, the regulations suggest that the provider advise her that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." §59.8(b)(5)[5a]. In §59.2, "family planning" is defined to exclude "pregnancy care" [1a], but §59.8(a)(2) nonetheless requires that pregnant women be

[2] Materials not included in the Appendix annexed hereto but which appeared in the Joint Appendix filed in the court of appeals shall be referred to as ["____A, Vol. ____"], or by name and document if not included therein. All references to affidavits in the record will be to last name, paragraph number and appendix page, if applicable.

provided with a "list of available providers that promote the welfare of mother and unborn child." This referral list may not include providers whose "principal business is the provision of abortions," §59.8(a)(3). The sole exception to this mandatory referral for prenatal care is when "emergency care is required." §59.8(a)(2)[3a].

Section 59.9 requires that clinics attain complete "physical and financial" separation between approved Title X-funded and disapproved non-Title X-funded services [5a]. The Secretary is to look at various factors to determine on an ad hoc basis whether programs have achieved "objective integrity and independence." Clinics must submit assurances to the Secretary that they have complied with this section at the time of their grant renewals.

Section 59.10 prohibits activities that HHS deems to "encourage, promote or advocate abortion", including disseminating educational materials on abortion, or having information describing abortion available in a clinic's waiting room [6-7a]. The dissemination of anti-abortion information is not similarly prohibited.

In February 1988 the State and City of New York sued in federal district court to enjoin the regulations, alleging that they were contrary to congressional intent underlying Title X, that they were arbitrary and capricious, and that they violated the constitutional privacy rights of women and the First Amendment rights of women and their health care providers.[3] On June 30, 1988 the district court for the Southern District of New York granted summary judgment in favor of DHHS and dismissed plaintiffs' consolidated complaints [9-32a].

On November 1, 1989 a divided panel of the court of appeals affirmed the district court. Recognizing that the regulations were a departure from longstanding agency policy, the majority

[3] The action herein, *State of New York v. Bowen*, was consolidated with another action simultaneously brought by various private health care providers and patients, *Rust v. Bowen*. *See* 690 F. Supp. 1261 (S.D.N.Y. 1988).

nonetheless found that they were consistent with the statutory language and legislative intent [46-52a]. The majority did not engage in a separate analysis of whether the regulations were arbitrary and capricious [53a]. The majority also concluded that the regulations did not impermissibly burden women's privacy rights, relying on *Maher v. Roe*, 432 U.S. 464 (1977), *Harris v. McRae*, 448 U.S. 297 (1980), and *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989) [53-56a]. The majority conceded that the regulations "may hamper or impede women in exercising their right of privacy in seeking abortions", but determined that "the practical effect of such a denial on the availability of such services is constitutionally irrelevant" [55a]. Similarly, the majority held that the ban on abortion counseling, referral and advocacy did not violate the First Amendment rights of health care providers or women, as the government may refuse to subsidize the exercise of fundamental rights, including speech, and that the ban did not constitute viewpoint discrimination [56-59a].

The concurring judge, while finding the regulations to be a permissible construction of the statute, expressed two concerns: first, that the separation requirement of §59.9, and specifically the question of separate personnel, would authorize the Secretary to deny funding based on the non-Title X activities of Title X-funded personnel and, second, that the compelled concealing of information about abortions and inadequate referrals would harm a vulnerable patient population [60-62a].

The dissenting judge found that the counseling and referral ban was viewpoint discriminatory in that it "require[d] the grantee to emphasize prenatal care and prohibit[ed] it from identifying any entity as a provider of abortions". Moreover, the dissent found that the content restriction was "all the more pernicious" in that it deprived women of their right to choose whether or not to have an abortion [64a]. Finally, the dissent concluded that the regulations were arbitrary and capricious because the turnaround in policy was not justified by any facts in the record before the agency, and because it was blatantly political [66-67a].

Reasons for Granting the Writ

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT THE EXTENT TO WHICH, CONSISTENT WITH THE CONSTITUTION, GOVERNMENT CAN CURTAIL SPEECH ABOUT ABORTION IN A PUBLICLY SUBSIDIZED HEALTH PROGRAM

This case presents the important question of whether regulations which forbid speech about abortion and compel speech about its alternatives by a health care provider advising a pregnant woman in the context of a publicly subsidized health program can be justified on the grounds that government has "the authority . . . to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds", *Maher v. Roe*, 432 U.S. 464, 474 (1977); *see also Harris v. McRae*, 448 U.S. 297 (1980).

This question was not resolved in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), where this Court dismissed as moot a challenge to a statutory ban on the use of public funds for "encouraging or counseling" abortion. This Court relied on Missouri's representation that the ban was directed solely to the conduct of those expending public funds, and not to the conduct of any physician or health care provider, and the appellees' subsequent withdrawal of their challenge. *Id.* at 3053. Several Justices noted, however, that if the Missouri courts ultimately were to interpret the ban on the use of public funds to "prohibit publicly employed health professionals from giving specific medical advice to pregnant women," a serious controversy would arise. 109 S.Ct. at 3060 (O'Connor, J., concurring); *id* at 3069 n.1 (Blackmun, J., concurring in relevant part); *see also id.* at 3053 (opinion of the Court relying on representation that funding restriction was "not directed at the conduct of any physician or health care provider").[4]

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[4] This Court similarly did not resolve this issue in *Planned Parenthood of Cent. and N. Arizona v. Babbitt*, 479 U.S. 926 (1986) in which the cross-appeal challenging the prohibition on state funds for counseling or referrals for abortion was dismissed.

The speech restrictions at issue here are even more extreme than those struck down by the Eighth Circuit in *Webster*. The challenged regulations not only prohibit abortion counseling, but also referral, while simultaneously requiring referrals for prenatal care whether or not they are medically appropriate. The precise issue presented herein is also pending in two courts of appeals. *See Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (preliminary injunction issued), 687 F. Supp. 540 (D. Colo. 1988) (permanent injunction issued), *appeal pending*, No. 88-2251 (10th Cir.); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *aff'd*, No. 88-1279 (1st Cir. May 8, 1989), *vacated and withdrawn, reh'g en banc granted*, No. 88-1279 (1st Cir. Aug. 9, 1989). The court of appeals decision in the instant case is in conflict with the Massachusetts and Colorado district court decisions. Given the importance of the questions presented and the possibility of a conflict among the courts of appeals if either the First or Tenth Circuit affirms, the conflict between the Second Circuit's opinion and those of the two district courts is an additional reason for granting certiorari. *See* R. Stern and E. Gressman, *Supreme Court Practice* 208-09 (6th ed. 1986).[5]

Resolution of this case will have important practical as well as constitutional ramifications. The regulations govern a family planning program that has successfully reached millions of women who might otherwise have no access to family planning or reproductive health care. It has proved to be for many poor women the entry-point into the general health care system, as Congress envisioned. While New York State itself earmarks funds for family planning, Title X remains an important component of the state's overall effort to provide its residents with these sorely needed services. *See generally* affidavit of Dr. Melita Gesche [543A, Vol.2].

Title X funds currently represent approximately 25 percent of New York State's total budget for family planning services (Affidavit of Dr. Linda Randolph ¶6, attached to appellants'

[5] In the alternative, petitioners ask this Court to defer consideration of the petition until after a decision by either the First or Ninth Circuit.

motion in the court of appeals for injunction pending resolution by this Court). The New York State Department of Health (NYSDOH) provides subgrants of these monies to 37 delegate agencies throughout the state including county hospitals, county health departments and private non-profit health providers which together serve approximately 200,000 women [75a]. Many patients have no other source of routine health care or reproductive health information and cannot afford private doctors. Randolph ¶¶10, 12; Felton ¶13(e) [88-89a]; Fink ¶3 [533A, Vol.2]; Tiezzi ¶8(a) [94a]; Merrens ¶5 [95a]; Drisgula ¶18 [89a]. These clinics not only provide essential pregnancy testing and diagnosis and contraceptive services, but also vital preventive medical services, such as routine screening for sexually transmitted diseases, cervical and breast cancer, and educational programs. Gesche ¶17 [549A, Vol.2]; Felton ¶5 [525A, Vol.2.]; Drisgula ¶6 [512A, Vol.2]; Merrens ¶6 [635A, Vol.2]; Tiezzi ¶3 [725A, Vol.2]. In sum, Title X clinics are a keystone of New York's public health program.

The regulations pose a difficult dilemma for health care providers. If clinics choose to comply with the regulations' ban on abortion counseling and referral, the delivery of high quality care to poor women will be severely compromised. Medical professionals in complying clinics cannot inform pregnant women of their full range of options, or promptly refer them to facilities where they can get abortions or even full information about abortion.[6] Similarly, compliance with the separation requirement of the regulations will undermine the current system, necessitating costly organizational restructuring for some clinics and closing down for others. The net effect will be to leave already underserved communities with even fewer or no family planning providers [76a].

[6] Exclusion of providers who "principally" provide abortions from the mandatory referral lists effectively denies Title X patients meaningful access to abortions. Seventy percent of all abortions nationwide are performed at clinics which do a large number of abortions, and who are ineligible under the regulations for inclusion on the referral list. Henshaw ¶4 [82a].

If clinics choose not to comply with the regulations and thereby forfeit their Title X funding, thousands of women with no alternative reproductive health care will go unserved. NYSDOH estimates that if all of its delegate agencies decide they cannot comply, 6200 women will be unable to obtain services. If only half of those women experience an unintended pregnancy, there could be an additional 843 out-of-wedlock births and 1498 more abortions among New York State residents in the coming year. Randolph ¶19. The cost of such events, whether measured in human or economic terms, will surely be great.

II. THE COURT OF APPEALS DECISION UPHOLDING THE CONSTITUTIONALITY OF THE CHALLENGED REGULATIONS CONFLICT WITH PRECEDENTS OF THIS COURT

A. *The Second Circuit Erred in Holding that Regulations 59.8 and 59.10 Do Not Violate the First Amendment Because They Are a Permissible Condition on Funding*

The court of appeals, in concluding that the ban on abortion counseling, referral and advocacy is permissible as a mere refusal to subsidize the exercise of speech rights, exhibited a disregard for what the regulations actually represent — an attempt to manipulate subsidies so as to compel the expression of officially approved speech and to muffle disapproved speech. While it is true that government may, consistent with the Constitution, decline to subsidize the exercise of fundamental rights, including speech, it may not do so where the object is to suppress a disfavored point of view. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (while Congress had no obligation to pay for lobbying, "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " [quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)]). *Cf. Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 811-13 (1985) (remanding

for a determination whether an apparently reasonable exclusion of certain speech from a limited public forum was a "facade for viewpoint-based discrimination").

The regulations are designed to stop the flow of information about abortion by preventing grantees from informing a pregnant woman about the availability of abortion or even where she can get full abortion-related information. Women who ask about abortion are to be told by the grantee that abortion is not considered "an appropriate method of family planning." §59.8(b)(5)[5a]. And although the grantee is permitted to give the woman a list of prenatal care providers that might also perform abortions, the list cannot include providers whose "principal business" is the provision of abortions (a requirement that disqualifies the most important abortion providers, see n. 6), and cannot be "weigh[ed]" in favor of abortion providers. §59.8(a)(3)[3a]. Moreover, the grantee cannot inform the woman, even if she asks, which prenatal care providers on the list perform abortions.

As the dissent below makes clear [63-64a], the regulations at the same time compel speech about prenatal care to the pregnant woman, regardless of her medical needs, her circumstances or her wishes. For instance, §59.8(a)(2) requires the grantee to refer a pregnant woman for "appropriate prenatal services by furnishing a list of available providers that promote the welfare of mother and unborn child." [3a].

The regulations are designed to use the consultation between the health care professional and the pregnant woman as a way to further the federal government's anti-abortion ideology.[7]

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[7] A revised draft of the Department's *Program Guidelines for Project Grants for Family Planning Services* obtained by one of the plaintiffs in *Mass v. Bowen*, spells out even more clearly the Department's intention to suppress any speech about abortion. The provision requiring non-directive counseling (including counseling on abortion) has been replaced by a statement that "[t]hose clients with a positive pregnancy diagnosis *must* be referred for prenatal care" (emphasis added). Moreover, under "Referrals and Follow-up", the draft deletes "services related to abortion" from the list of services for which referrals can be made.

"A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'" *Consolidated Edison Co. v. Pub. Serv. Commision*, 447 U.S. 530, 546 (Stevens, J., concurring).[8]

That the regulations would in actuality leave some women ignorant of or confused about abortion is undisputed on the record. For example, in many communities currently served by Title X-funded programs, no other comparable family planning provider exists. *See, e.g.*, Randolph ¶¶10, 12, 14, 18; Coombs ¶¶11, 12 (attached to motion in the court of appeals for injunction pending appeal); Fink ¶10 [85a]; Stein ¶¶7, 9, 11 (motion for injunction pending appeal). Some providers, particularly in rural areas, stated that but for the Title X program, many of their patients would not know that abortion is a legal option for them. Drisgula ¶20 [518A, Vol. 2]; S. White ¶13 [87a]; Merrens ¶15[95a]. *See also* Henshaw ¶5[82-83a] (out of the State's 62 counties, 16 have no identifiable providers of abortions, while in an additional 21, the only available providers are hospitals). Under these circumstances, this Court's caution in *Webster v. Reproductive Health Services* is apt — that a ban on the use of public facilities or employees might impermissibly burden reproductive choice if medicine in the state were socialized and all hospitals and physicians publicly funded. 109 S. Ct. 3040, 3052 n.8.

B. *The Separation Requirement Impermissibly Infringes on the Independently Funded First Amendment Activities of Title X Grantees*

Section 59.9 requires physical and financial separation of Title X-funded programs and independently funded abortion-related

[8] Whether the regulations authorize argumentation "pro or con" as to the advisability of an abortion, as petitioners submit, or they do not, as the majority *(Footnote continued)*

activities — including those protected by the First Amendment, such as counseling, referral and lobbying. The regulation stresses that Title X projects must have "an objective integrity and independence from prohibited activities" and that "[m]ere bookkeeping separation" is not enough [5a]. The existence of separate personnel is one of the indicia of separation the Secretary will examine in making determinations of whether grantees are in compliance with the requirement.

Thus clinics are confronted with two untenable choices: compliance with an unduly burdensome separation requirement, or loss of Title X funding, a choice which infringes the independent exercise of constitutional rights with non-Title X funds. This Court has repeatedly held that government may not condition benefits or subsidies on the relinquishment of a non-subsidized constitutional right. *See Perry v. Sindermann*, 408 U.S. 593, 597(1972); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958).[9] The district court itself acknowledged that the separation requirement "imposes significant changes on Title X projects", citing extensively from uncontroverted statements in the

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below believed [59a], is not dispositive of whether or not they are viewpoint discriminatory. That discussion of the entire topic of abortion is prohibited is sufficient. In *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 230 (1987), this Court emphasized that impermissible viewpoint discrimination can occur when discussions of entire topics are forbidden. *See also FCC v. League of Women Voters of California*, 468 U.S. 364, 383-84 (1984).

[9] None of the plaintiff clinic providers in the companion case to this action fund their entire family programs through Title X; proportions of the total budget represented by Title X range from 23% to 50% [11a]. In addition, §59.2 defines "Title X project funds" as "all funds allocated to the Title X programs, including but not limited to grant funds, grant-related income or matching funds." [2a] Title X projects have always been required to supplement federal monies with matching funds, and many also charge fees on a sliding scale for those clients who can pay, which are designated as "grant-related income." Thus, in restricting the use of "Title X project funds", the regulations significantly limit the projects' use of nonfederal money.

record. [26-27a].[10] While the majority below expressed concern about the effect of the regulations on privately funded consultations [59a, 61a], it failed to consider other cases in which this Court invalidated less onerous burdens on independently funded speech.

In *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) this Court invalidated a ban on corporate election expenditures as applied to a non- profit, "pro-life" organization on the ground that a requirement "to speak through a segregated fund" may necessitate such "significant efforts" as to inhibit free speech. *Id.* at 252 (plurality opinion). Although the government may require some degree of separation as a condition on funding, *Id.* at 256 n. 9, actual burdens imposed by such requirements must be examined. For example, *Taxation With Representation*, *supra*, upheld a separation requirement because "[t]he IRS apparently requires only that the two groups [the non-profit organization and its lobbying affiliate] be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." 461 U.S. at 544-45 n.6. In *FCC v. League of Women Voters*, *supra*, the Court suggested that the ban on editorializing might have withstood scrutiny if physical separation were not required because an affiliate organization could then "use the station's facilities to editorialize." 468 U.S. at 400. The separation requirement here goes well beyond either of the provisions considered in *Taxation With Representation* or *League of Women Voters*, and is invalid as an impermissible burden on independently funded speech.

[10] Other courts considering these precise regulations have found that the separation requirement impermissibly burdens privately funded activities, whether they be Title X matching funds, *Massachusetts v. Sec'y of Health and Human Services*, slip op. at 56-59 (1st Cir. 1989) (Torruella, J., concurring in part and dissenting in part) *vacated and withdrawn, reh'g en banc granted*, No. 88-1279 (1st Cir. Aug. 9, 1989), fees from privately paying patients, *Planned Parenthood v. Bowen*, 680 F. Supp. 1465, 1476 (D. Colo. 1988), or non-Title X funds of programs attempting to comply with the physical separation requirement, *Massachusetts v. Bowen*, 679 F. Supp. 137, 146 (D. Mass. 1988).

C. *The Second Circuit Erred in Holding that the Regulations Do Not Impermissibly Interfere with the Woman's Privacy Right to Make a Fully Informed Choice Whether or Not to Continue Her Pregnancy*

Citing *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); and *Maher v. Roe*, 432 U.S. 464 (1977), the court of appeals upheld the regulations as a permissible condition on funding. But the federal government's decision to embargo speech about abortion within the context of an otherwise funded consultation between the pregnant woman and the health professional, is fundamentally different from a simple refusal to subsidize the performance of abortion through public funds, facilities or employees. As was made clear in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759, 762 (1986), and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429-30, 443-45 (1983), the heart of the woman's privacy right is the right to make a fully informed, intelligent decision — indispensable to which is a full and frank discussion between the woman and her health care provider. Skewing this dialogue does not merely leave the woman in ignorance of or unsure about all her options, it creates the misimpression that she has received full information about them. The regulations go beyond a refusal to subsidize, erecting instead an affirmative obstacle in the path of a woman who seeks to exercise her right of procreative choice. Indeed, the majority below conceded that the regulations "may hamper or impede women in exercising their right of privacy in seeking abortions" [55a], but held that their practical effect was "constitutionally irrelevant." But a recognition of their actual effect is crucial to the analysis.[11]

The record shows that women who have come to rely on Title X for complete and medically sound counseling will be misled by the selective disclosure of information, which will result in

[11] The concurring judge expressed concern that "[c]rafting the regulations in this fashion constitutes a trap for the mostly unsophisticated and unwary

(Footnote continued)

undermining the doctor-patient relationship and delaying some women in obtaining abortion services. *See, e.g.*, Morley ¶12-14 [79a]; Sammons ¶4 [81a]; Katz ¶6-8 [83-84a]; Felton ¶ 13(a and b) [88a]; Drisgula ¶22 [90a]; Potteiger ¶17, 18 [91a]. Where Title X programs are the only continuing source of health information and medical care, delay could deprive the woman of any genuine choice. In other cases, the woman may never be fully informed of all her choices. In sum, by requiring the dissemination of misinformation, the regulations do more than encourage childbirth. They constitute a "direct state interference with a protected activity," *Maher v. Roe*, 432 U.S. at 475, and do not, as in *Harris v. McRae*, 448 U.S. at 316-17, leave an indigent woman no worse off with regard to her "range of choice . . . [than] if Congress had chosen to subsidize no health care costs at all." *See Reproductive Health Services v. Webster* , 851 F. 2d 1071, 1080 (8th Cir. 1988) (striking down as unconstitutional Missouri's ban on state-funded abortion counseling, a holding not appealed by Missouri); *Planned Parenthood v. Bowen*, 680 F. Supp. 1465, 1473-76 (D. Colo. 1988).

III. THE COURT OF APPEALS ERRED IN UPHOLDING THE REGULATIONS AS A PERMISSIBLE CONSTRUCTION OF THE STATUTE AND IN FAILING TO DETERMINE WHETHER THEY ARE ARBITRARY AND CAPRICIOUS

A. *The Regulations Are Contrary to Congressional Intent*

Contemporaneous legislative history, the pattern of administrative enforcement, and subsequent congressional refusal

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patients" [61a]. The majority's conclusion that it was not necessary to examine the actual impact of the regulations runs counter to this Court's precedents. *See, e.g., Lyng v. Int'l Union, United Auto Workers*, 108 S. Ct. 1184, 1189-90 (1988) (upholding constitutionality of federal statute disqualifying household of striking workers from eligibility for food stamps, finding it "exceedingly unlikely" that it would actually affect associational rights); *see also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252-56 (1986) (plurality opinion) (examination of practical effect of regulations imposing burdens on private, segregated fund for speech).

to amend the statute, confirm the challenged regulations' inconsistency with the underlying aims of Title X. The program was enacted in 1970 to reach the millions of low income women who had no access to affordable family planning services, and in many cases, no access to affordable general health care. Central to Congress' conception of the program was that the best way to reach these women was to integrate family planning services wherever possible with other health care services, and that in order to do so effectively, the standard of care offered would have to be comparable to generally accepted medical practice. Given these policy choices, it may have been reasonable for Congress to carve out abortion from the list of permitted services. But it was unreasonable for DHHS to read §1008 as authorizing censorship of information about abortion and forcing the physical separation of Title X facilities from those engaging in abortion-related activities. The regulations go far beyond the language and purposes of the statute. *See Sullivan v. Zebley*, 58 L.W. 4177 (U.S. Feb. 20, 1990).

The 1970 Conference Report, the most weighty and persuasive piece of legislative history, *see National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 832-33 n.28 (1983), makes clear that §1008 is a narrow prohibition not intended to interfere with Title X's expansive scope.

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, *and other related medical, informational, and educational activities*. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent. The legislation *does not and is not intended to interfere with or limit programs conducted in accordance with State and local laws and regulations which are supported by funds other than those authorized under this legislation*.

H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8-9, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82 (emphasis

added) [70a]. Since abortion was legal by 1970 in at least 30 states under varying circumstances, the above language makes clear that §1008 could not have been intended to censor information about abortion, or to interfere with counseling or referrals to abortion providers.

Congress clearly expressed its desire that Title X be integrated with other health care programs. The statute mandates state health authorities who receive funds under the program to submit to the Secretary "a plan for a coordinated and comprehensive program of family planning services." 42 U.S. §300a(a) . This goal, however, is undercut by the regulations which in some respects conflict with state law and professional standards of care.[12]

The history of DHHS's enforcement of §1008 buttresses the conclusion that the funding prohibition is to be narrowly construed. The agency's contemporaneous interpretation of the statute, the one entitled to the greatest weight by the court, *EEOC v. Associated Dry Goods, Corp.*, 449 U.S. 590, 600 n. 17 (1981), required referral by Title X programs to all services. *See* 36 Fed. Reg. 18465, 18466 (§59.5(d) and (e)). The Department acknowledged that abortion might be one such service.

[12] *See, e.g.*, N.Y. Pub. Health Law §2800 (high quality, reasonably priced medical care of vital concern to the public health), and N.Y. Pub. Health Law §2805-d (McKinney 1985 & Supp. 1988) (providers must inform patients of all risks and benefits on a particular mode of treatment) Gesche ¶15 [75a]; Randolph ¶3 [77a]. *See* also N.Y. Educ. Law §§6506-6509; 8 NYCRR 29.2. The regulations also contravene New York common law on physicians' duty of care. *See, e.g.*, *Shack v. Holland*, 389 N.Y.S. 2d 988 (Sup. Ct. Kings Co. 1976). They make it impossible for family planning clinics to participate in the State's and City's aggressive campaign against AIDS. Gesche ¶17 [549-50A, Vol.2]; Joseph ¶¶8-9 [motion for injunction pending appeal]. They will interfere with the State's system for assessing the need for health facilities and for licensing those facilities, N.Y. Pub. Health Law §2802 (McKinney 1985) Gesche ¶23 [552-53A, Vol.2]. Moreover, the ban on abortion referral and counseling compels physicians and health professionals to violate canons of medical ethics, *see, e.g.*, American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 56-57, 84-85 (1985) Morley ¶¶18-19, 21 [motion pending appeal and 79-80a]; Sammons ¶¶3-4 [80-81a], making it difficult to attract competent professionals to work within the system. *See* Katz ¶18 [624A, Vol. 2].

> Within the context of family planning services programs, abortions are not viewed as a method of fertility control but as a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure.

HEW National Center for Family Planning Services, Health Services and Mental Health Administration, *A Five Year Plan for Family Planning Services* 319 (1971) [73a]; *see also id.* at 318[13].

For the ensuing seventeen years, HHS continuously reaffirmed its initial understanding of the scope of the funding ban in §1008. The first Program Guidelines issued by HHS under Title X emphasized the comprehensive nature of the care that grantees were expected to provide. *Program Guidelines for Project Grants for Family Planning Services* 2 (1976). Contrary to the Secretary's assertion that "requirements for options counseling and abortion referral were first announced in 1981," Pr., 53 Fed. Reg. at 2933, the 1976 Guidelines specifically directed grantees to provide "pregnancy counseling" and referral "for any needed services not furnished through the facility." [72a]. Abortion was not excluded from these counseling and referral requirements.[14]

These requirements were reinforced in 1981 Guidelines that required Title X projects to provide "information ... nondirective counseling ... and referral upon request" for "prenatal care and delivery [;] infant care, foster care, or adoption[; and] pregnancy termination" as options for managing unintended

[13] The report recognized that, while the number of abortions should decrease with increased availability of methods of fertility control, abortion would nonetheless "serve as a backup measure for contraceptive failure, thereby still further assuring the freedom of choice of those who do not desire an unwanted birth." *Id.* at 319.

[14] In fact, the guidelines expressly directed discussion of abortion when a pregnant patient was discovered to have an IUD in place [72a].

pregnancy [71a]. Numerous interpretive opinions issued by HHS underscored this view.[15]

Subsequent inaction by Congress in the face of many attempts to alter Department policy through new legislation supports the presumption that Congress approved of the previous policy. "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress", *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974).

Congress reauthorized Title X six times without pertinent change in the last eighteen years,[16] repeatedly rejecting efforts to place counseling and referral restrictions on the Title X program. Between 1974 and 1985, Congress considered numerous bills that would have prohibited the use of federal funds for referral or

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[15] For example, HHS concluded that a Title X project may "[s]upply information to those who do not want to continue their pregnancies, and may be interested in obtaining abortions," and "[r]efer clients to doctors to obtain abortions." Memorandum from Carol Conrad, Office of Gen. Counsel, to Elsie Sullivan, Office for Family Planning (Apr. 14, 1978) (108-11A, Vol.1); *see also* Memorandum from Louis Belmonte, Regional Program Consultant, Office for Family Planning (May 25, 1979) ("[t]he provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible") [75a]; Memorandum from Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to Hilary H. Connor, M.D., Regional Health Adm'r (Nov. 19, 1976) [74a]. The agency later confirmed that Title X required "referral to a provider who might recommend or provide an abortion in cases where such a referral is necessary . . . [A] project could not – consistent with §59.5(d) – refuse as a matter of policy to make such referrals in any case, regardless of the medical indications therefor." Memorandum from C. Conrad to E. Sullivan, (July 25, 1979) [72-73a]. *See also Valley Family Planning v. North Dakota*, 661 F.2d 99, 101 (8th Cir. 1981); *Doe v. Pickett*, 480 F. Supp. 1218, 1220 (S.D. W.Va. 1979).

[16] Title X was reauthorized in 1973. Pub. L. No. 93-45, 87 Stat. 91 (1973). It was reauthorized again in 1975, Pub. L. No. 94-63, 89 Stat. 304 (1975), again in 1977, Pub. L. No. 95-83, 91 Stat. 383 (1977), again in 1978, Pub. L. No. 95-613, 92 Stat. 3093 (1978), again in 1981, Pub. L. No. 97-35, 95 Stat. 358 (1981) and again in 1984, Pub. L. No. 98-512, 98 Stat. 2409 (1984). Since 1985 the Title X program has been funded through a series of continuing resolutions.

the promotion or encouragement of abortion. *See* 120 Cong. Rec. 21687-94 (1974); 120 Cong. Rec. 31452-58 (1974), 30 *Cong. Quart. Almanac* 97 (1974); 121 Cong. Rec. 20863-6 (1975); 124 Cong. Rec. 37045 (1978); 124 Cong. Rec. 31238-56 (1978); 124 Cong. Rec. 37044-49 (1978); H.R. Rep. No. 159, 99th Cong., 1st Sess. 6-7 (1985); H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985); H.R. Conf. Rep. No. 960, 99th Cong., 2d Sess. 12 (1986); S. Rep. No. 286, 100th Cong. 2d Sess. 14 (1988). Each of these amendments was defeated.

"It is hardly conceivable that Congress – and in this setting, any member of Congress – was not abundantly aware" and approving of the agency's long-standing interpretation of the statute. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983). In fact, the Secretary concedes as much. Pr., 53 Fed. Reg. at 2935 [330A, Vol. 2].

The separation requirement contained in §59.9 is no less inconsistent with the statute, since Title X was "not intended to interfere with or limit programs . . . supported by funds other than those authorized under this legislation." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 6, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5082. From its enactment until the new regulations were promulgated, HHS had interpreted §1008 to have no effect on activities funded by sources other than Title X. *See* Memorandum from J. Mangel to L. Hellman, M.D. (Apr. 20, 1971) [74a]; *see also* 124 Cong. Rec. 31241-42 (1978).

That conclusion was consistent with the agency's belief that Title X required "coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other Federal programs." 42 C.F.R. §59.5(b)(8)(1986). Thus, contrary to the court of appeals' view that the new 59.9 represents no material change in policy [52a], the agency has never required separate facilities or any of the other alleged indicia of "separation" listed in §59.9.

Subsequent legislative history confirms the previous agency policy as consistent with congressional intent. In 1974, Congress

expressed approval that HHS was beginning "the integration of comprehensive family planning services into other health care settings such as neighborhood health and migrant health centers". H.R. Rep. No. 1161, 93d Cong., 2d Sess. 15-16 (1974). The Conference Committee on the 1974 reauthorization of Title X also stressed its belief that Title X services "are most effectively provided in a general health setting." H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 58 (1974).

When Congress reauthorized Title X in 1975, the Senate Committee on Labor and Public Welfare stressed that "family planning services under Title X generally are most effectively provided in a general health setting and thus [the Committee] encourages coordination and integration into all programs offering general health care". *See* 121 Cong. Rec. 9799 (1975). *See also* S. Rep. No. 29, 94th Cong., 1st Sess. 55, *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 517. And in 1978, an amendment proposed by Rep. Dornan, which would have been identical in effect to §59.9 of the new regulations, was defeated. *See* 124 Cong. Rec. 37046 (1978).

Despite this clear congressional intent, §59.9 makes it impossible for Title X projects to make unrestricted use of non-Title X funds. Although the Preamble to the new regulations protests that only Title X funds are affected, *e.g.*, Pr., 53 Fed. Reg. at 2925, 2942 [but *see id.* at 2922 ("section 1008 extends to all activities conducted by the federally funded project, not just the use of federal funds for abortions within the project")], the plain terms of the regulations are to the contrary. Section 59.9 imposes substantial restrictions on the use of non-Title X funds which are unwarranted by the language of §1008, and which undercut the statute's aim of integration and coordination with other services.

B. *The Court of Appeals Erred In Failing to Make A Separate Determination Of Whether The Regulations Are Arbitrary And Capricious*

The court of appeals, after finding that the new regulations were a permissible construction of the statute, failed separately to inquire as to whether the regulations are arbitrary and

capricious [53a]. Whether the regulations are a reasonable construction of the statute, however, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984), is not necessarily the same question as whether they are arbitrary and capricious. *See, e.g., Hazardous Waste Treatment Council v. U.S. E.P.A.*, 886 F.2d 355, 361, 364-65 (D.C. Cir. 1989) (while agency's choice may be a reasonable one under the statute, its rationale for the choice was not adequate); *Int'l Bhd. of Electrical Workers v. I.C.C.*, 862 F.2d 330, 338 (D.C. Cir. 1988) (question of agency's authority under the statute to make a policy choice distinct from question of whether its decision was arbitrary or capricious).

An agency's action is arbitrary and capricious if, as here, the basis for its decision does not demonstrate "a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

As the dissenting judge below recognized, the evidence before the agency does not justify its new regulations. Although the Secretary insisted that clearer rules were necessary to instruct "grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning," Pr., 53 Fed. Reg. at 2923 [318A, Vol. 2], significant findings in the 1982 General Accounting Office Report, which was relied upon heavily by the agency, *see* Pr., 53 Fed. Reg. at 2923-24 [318-19A, Vol. 2], run counter to this conclusion. The GAO found "no evidence that Title X funds had been used for abortions or to advise clients to have abortions," and "no indications that any women were . . . encouraged to have abortions." [66a], [734-35A, Vol. 2]. Moreover, the GAO report specifically rejected the necessity for physical separation of Title X-funded facilities and those performing abortion-related services. [734-35A, Vol. 2].

Moreover, the Department "entirely failed to consider an important aspect of the problem", *Motor Vehicle*, 463 U.S. at 43, by not acknowledging that the regulations would hinder states' efforts to coordinate the delivery of all family planning services

pursuant to their statutory responsibilities, 42 U.S.C. §300a(a). The separation requirement, which may necessitate the restructuring or closing of many clinics, will leave many already underserved communities with no family planning services, thus interfering with the State's overall plan for reaching as many people as possible. The Secretary's casual disregard for the serious consequences to the state-wide public health scheme, *see* Pr., 53 Fed. Reg. at 2933 [328A, Vol. 2], highlights the regulations' arbitrariness. *See Bowen v. American Hospital Assn.*, 476 U.S. 610 (1986).

In sum, the Secretary would be hard pressed to claim the new regulations are based on any legitimate considerations or facts in the record before it. Reasoned judgment is not the driving force behind the turnaround. At oral argument in the district court, counsel for the defendant "admitted that [the] new regulations were the result of a shift in the political climate", stating

> it is certainly true that one of the prime reasons for these regulations is a stricter enforcement of the separation of abortion as family planning from Title X programs. That is a matter of policy. It is a matter of politics.

See Transcript of Oral Argument in district court [98a]; *see also* correspondence between Secretary of DHHS and members of Congress [98-100a]. Surely, a reversal in policy which cannot be justified by any intervening change in circumstances, which is not supported by the evidence before the agency, and which has been conceded to be the product of shifting political winds is at least colorably arbitrary and capricious. The court of appeals erred by not even considering the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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